

# DIVORCE ACT 2021

Presentation by Sharon J. Crooks LLM, P-Med, C-Arb



ROWANOAK LAW OFFICE LLP

# JURISDICTION

- **REMEMBER THAT THE DIVORCE ACT ONLY APPLIES TO PEOPLE WHO WERE LEGALLY MARRIED**  
(not common-law or interdependent partners etc.).
  - The above changes in language bring the new Divorce Act more into line with provincial Family Law Acts.
  - These definitional and language changes which reflect a new linguistic approach to parenting, will result in new case law interpreting the updated language. As this new case law develops it will affect the interpretation of the provincial acts across Canada.

# New Objectives

- Bill C-78's amendments aim to:
  - Promote Children's best interests
  - Address family violence
  - Further poverty reduction
  - Increase the accessibility of the family justice system.

Most changes focus on parenting arrangements and the new language and definitional changes which reflect a new linguistic approach to parenting.

# What is Not Changed

- There are no substantive changes to the rules around determining the amount of child support or spousal support .
- There are no changes to
  - ground(s) for divorce
  - jurisdiction for divorce/corollary relief (except in cases where there is more than one application, see sections 3(2),(3), 4(2),(3), 5(2),(3))
  - basic variation process
- 2021 Divorce Act Changes Explained and compared with previous Divorce Act provisions  
<https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/dace.pdf>

# Linguistic Changes – “Parenting”

- Philosophically, changes turn the language of the *Act* away from that of possession, and towards language that reflect parental responsibility to children and their wellbeing.
- Reflects the language of mediation that has already been taken up in the Provincial Courts of AB, BC, NS
- “Custody” and “Access” are replaced with child-focused terminology
  - “Parenting order”: s. 16.1
  - “Decision-making responsibility”: ss. 2(1), 16.3
  - “Parenting time”: s. 16.2
- “Contact orders”: non-spouses, with leave: s.16.5 (e.g. grandparents)
- “Parenting plans are encouraged, but not mandatory: s. 16.6

# Transitional Provisions

- Proceedings started under the former *Divorce Act* but **not disposed of** as of the coming into force of the new Act (on March 1, 2021) are **governed by the provisions** of the new Act. (s. 35.3)
- The coming into force of the *Divorce Act* provisions does **NOT** constitute a “change in circumstances of the child” (s. 35.7)

# New Forms

- Alberta QB has issued revised forms to incorporate the new requirements of the *Act*.
  - <https://www.albertacourts.ca/qb/areas-of-law/family/family-law-forms/revised-divorce-forms>

# New Forms and Duties

- Statements of Claim/Counterclaims for divorce include a new “Statement of Plaintiff” driving home the focus on the best interest of the child. Comes from new duties of parents under ss 7.1 - 7.6

I, [name], the Plaintiff, certify to the Court that I am aware of the following duties imposed on me by sections 7.1 to 7.5 of the *Divorce Act* (Canada):

1. I will exercise any parenting time, decision-making responsibilities or contact with the child(ren) of the marriage in a manner consistent with the best interests of the child(ren).
2. I will protect the child(ren) of the marriage from conflict arising from these legal proceedings, to the best of my ability.
3. I will try to resolve the matters that may be the subject of an order under the Act through a family dispute resolution process, to the extent that it is appropriate to do so.
4. I will provide complete, accurate and up-to-date information if required to do so under the Act.
5. If I am subject to an order made under the Act, I will comply with the order until it is no longer in effect.



# New Duties for Lawyers

No change to substance re: reconciliation: s. 7.7(1)

Updated duties for legal advisers: s. 7.7(2)

1. Encourage the use of family dispute resolution, unless it would clearly be inappropriate to do so
2. Inform clients about family justice services that might assist to:
  - Resolve issues;
  - Comply with an order or decision.See Justice Canada website for links to family justice services (<https://www.justice.gc.ca/eng/fl-df/fjs-sjf/index.html>)
3. Inform clients about the client's duties under the Act

Certification in commencing/responding documents

# From “Custody/Access” to “Decision-making responsibility”

- No more “custody” or “access” in orders: s. 16.1
- “Decision-making responsibility”: s. 2(1)
  - “significant decisions about a child’s well-being”
  - Includes:
    - health;
    - education;
    - culture, language, religion and spirituality
    - significant extra-curricular activities
- Allocation of decision-making responsibility: s. 16.3
  - No more sole or joint “custody” – now sole, joint or divided “decision-making responsibility”
  - **No presumptions**

# Parenting Time Paradigm

- Definition: s. 2(1), time “in care” of parent
  - No need for physical presence during entire time
- May allocate by schedule: s. 16.2(2)
- If parenting time, “exclusive authority to make, during that time, day-to-day decisions affecting the child” (unless otherwise ordered): s. 16.2(3)
- s.16(6): change in marginal note (made administratively after Royal Assent): Not “Maximum parenting time”, instead...
  - “Parenting time consistent with the best interests of child”
- **Emphasizes no presumption of “equal time”**

# Parenting Orders

- Application by spouse [no longer called Access Order], s. 16.1(1), or
  - Parent of child, or person who:
    - stands in place of parent or *intends* to stand in place of parent
  - Leave still required for non-spouses: s. 16.1(3)
- Contents of order: s. 16.1(4)-(9). Orders may
  - Allocate parenting time, decision-making responsibility
  - Communication with other parent during parenting time
  - Family dispute resolution process
  - Authorize/prohibit relocation
  - Prohibition on *removal* of child from area: different from residence restriction
  - Supervision of parenting time and transfers
  - Other terms/conditions, ex. limitation on entitlement to info (s. 16.4)

# Contact Orders

- Formerly “access” by non-spouse
- Contact order contents: s. 16.5(5)
  - visits or by any means of communication
- Person other than spouse, with leave: s. 16.5(3)
- Factors: s. 16.5(4), “all relevant factors”, including whether contact can otherwise occur, e.g. during parenting time
- Terms, supervision, prohibition on removal of child
- To make contact order, court can vary parenting order: s. 16.5(9)
- Note: 6.1(3) – no contact order under Act, unless there is a parenting order

# Required (mostly) Parenting Plans

- Defined in s. 16.6(2):
  - document or part of a document, relating to parenting time, decision-making responsibility or contact, to which the parties agree
- s. 16.6(1): court *shall* include plan in parenting/contact order  
**UNLESS**  
*not* in best interests of child to do so, in which case the court may modify this requirement

# Variation

- Changes to parenting provisions in s. 17
  - Changes in wording, e.g. s. 17(2) re leave
- Change in circumstances still required:
  - Parenting/contact orders generally: s. 17(5)
  - Relocation deemed a change: s. 17(5.2)
  - If relocation prohibited, *not in itself* a change: s. 17(5.3)
- Contact orders:
  - If variation of contact order, may vary parenting order to take into account, and vice versa: s. 17(2.1),(2.2)
- s. 17(6.6): clarifies that s. 15.3 priority to child support over spousal support applies in a variation order

# Enhanced and Strengthened Language of the Best Interests of the Child

- Still consider “only the best interests”: s. 16(1)
- Introduces a list of best interests of the child factors
- Non-exhaustive, 11 factors, s. 16(3), including:
  - Child’s views and preferences (cl. (e)) [Article 12 of the UN CV on the Rights of the Child is referenced and language similar to the CV is used]
  - Child’s cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage (cl. (f))
- **“Primary consideration”** – “the child’s physical, emotional and psychological safety, security and well-being” (s.16(2))
- **No presumptions re: best parenting arrangements**



# Incorporation of Family Violence

- Now must be considered when adjudicating the best interest of the child(ren) – s.16(3)(j)
- Factors relating to family violence – s.16(4)
  - Nature, seriousness and frequency, Pattern of coercive and controlling behaviour, Child's experience of family violence, Physical, emotional and psychological harm or risk of harm to the child, Compromise to safety, Fear for safety, Steps to prevent further family violence by person engaging in family violence, and "Other relevant factors"
  - S.16(4)(c) now references the effects of family violence on the development of a child's brain with life-long effects and arguably incorporates "Brain Science" into the new Act
- S.2(1) – evidence based definition
  - **family violence** means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes (...)

# “Family Violence” Includes...

- (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
- (b) sexual abuse;
- (c) threats to kill or cause bodily harm to any person;
- (d) harassment, including stalking;
- (e) the failure to provide the necessities of life;
- (f) psychological abuse;
- (g) financial abuse;
- (h) threats to kill or harm an animal or damage property; and
- (i) the killing or harming of an animal or the damaging of property;

# Specific Provisions Speaking to Family Violence

- Primary consideration: child's safety, security and well-being. Enhanced focus on child, including impact of family violence on child
- Best interests of the child criteria specific to family violence cases (ss. 16(3)(j),(k) and 16(4)) – court required to consider family violence and its impact
- Provisions on supervised parenting time and transfers (ss. 16.1(8) and 16.5(7))
- Provisions to allow prohibition on the removal of a child from a geographic area without the written consent of any specified person or without a court order authorizing the removal (s. 16.1(9))
- Exceptions to notice of changes of residence and relocation (s. 16.8(3), 16.9(3), 16.94(3))
- A provision to promote coordination between criminal, child protection and family cases (s. 7.8)

# Judges are Under New Duties

- Section 7.8:

Purpose to facilitate:

- Identification of orders, etc. that may conflict with order under *Divorce Act*
  - Coordination of proceedings, s. 7.8(1)
- Consider if pending or in effect
    - Civil protection order (previously Emergency Protection Orders under PAFV Act)
    - Child protection order (under CYFEA or PAFVA)
    - Criminal proceeding/undertaking/recognizance
- Civil protection order defined: s. 7.8(2)
- Information obtained through inquiries of parties (e.g. questions in court forms, mandatory affidavits). Act contemplates that in future information can be obtained through searches of databases, where provided for in provincial or territorial law. (added disclosure requirement?)

# Relocation

- The *Act* provides a new framework that significantly departs from *Gordon v Goertz* (1996) through:
  - Child-focused definition of “relocation” (s. 2)
    - No definition under the old *Act*
    - Under the new *Act*:
      - relocation means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility — or who has a pending application for a parenting order — that is likely to have a significant impact on the child’s relationship with
        - (a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
        - (b) a person who has contact with the child under a contact order;

# Relocation

- Mandatory notice, process (ss.16.7 -16.9 & 16.96)
  - 16.8 (1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to change their place of residence or that of the child shall notify any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.
  - Must include: the date on which the change is expected to occur and the address of the new place of residence and contact information of the person or child.
  - **16.8(3) – a court can direct that the above requirements do not apply in cases involving family violence, in which case an application can be made without notice to any other party.**

# Relocation – Notice con't

- Notice of change of place of residence: s. 16.8
- Notice of relocation: s. 16.9
  - Relocation, s. 2(1): “significant impact” on relationships
  - Mandatory, *both* parents, writing, at least 60 days before
  - Exception, including risk of family violence
  - Legislation and new regulations set out content for notice; to include proposal.  
See form: <https://www.justice.gc.ca/eng/fl-df/divorce/nrf-fad.html>
- The notice provisions under the *Divorce Act* will apply only if there is an order under the Act related to parenting responsibilities – i.e. where a person has “custody”, “access” “parenting time” “decision-making responsibility” or “contact” under the Act

# Relocation – Notice con't

A person who has given notice of an intention to relocate a child may do so as of the date referred to in the notice if:

1. The relocation is authorized by a court **OR**
2. a) person with parenting time or decision-making responsibility who has received the notice has not objected within 30 days **AND**  
b) there is no order prohibiting the relocation

Objection is by way of either:

1. prescribed form: <https://www.justice.gc.ca/eng/fl-df/divorce/orf-fod.html>; **OR**
2. court application



# Relocation

- Burdens of proof (s. 16.93)
  - 16.93 (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.
  - (2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.
- Added best interests factors specific to relocation cases (s. 16.92)
  - Reasons, impact, amount of time spent with child, compliance with notice requirements, presence of preexisting order/award, reasonableness, compliance with obligations.

# Relocation – Burden of Proof

- Where parents have substantially equal parenting time, the parent who intends to relocate has the burden of proving the relocation is in the best interests of the child
- Where the relocating parent has the vast majority of parenting time, the parent opposing the relocation has the burden of proving that it would not be in the best interests of the child
- These two burdens apply where the parenting time arrangement is in substantial compliance with an order, award or agreement
- In any other case, the parties have the burden of proving whether the relocation is in the best interests of the child; note re interim orders

# Relocation – Other issues

- **Factors Court shall not consider** (s.16.92(2) – the court is not to consider whether if the child's relocation was prohibited, the person who intends to relocate the child would: 1) relocate without the child or 2) would not relocate
- If court authorizes a relocation, it may provide for the **apportionment of costs** relating to the exercise of parenting time by a person who is not relocating (s.16.95)
- A **relocation of a child is deemed to be a change** in circumstances in an application to vary a parenting order or contact order (s.17(5.2))
- The fact that a relocation has been proposed and prohibited is **not** in and of itself a change in circumstances (s.17(5.3))

# Access to Justice

- Use of ADR is formally encouraged, but not mandatory - (ss. 7.3, 7.7(2)(a) and 16.1(6));
- Expanded rules around the child support recalculation scheme s25.01 and s25.01.
  - s25.01(7) – recalculation of an order under the *Act* can be done either by a court or by a provincial recalculation program;
- Amendments to promote access to income information;
- Implementation of two Hague Family Law Conventions (1996 primarily jurisdiction issues, 2007 child support order enforcement)

# Jurisdictional Rules

- **The court of the child's habitual residence should generally hear and determine applications for parenting and contact:**
  - "Substantial connection" test would become a "habitual residence" test (s. 6)
  - Applications for contact would be made to court seized of a parenting application if a proceeding is ongoing. If not, then to court of habitual residence, unless that court determines otherwise (s. 6.1)
  - For removal/retention cases, the court of the child's habitual residence would have jurisdiction except under limited circumstances (consent/acquiescence, undue delay or the other court is better placed) (s. 6.2)

# Interjurisdictional Support

- Sections 18 and 19 of the former *Divorce Act* were modeled on the former REMO (Reciprocal Enforcement of Maintenance Orders) process.
- Provisional order made by a court in the applicant's jurisdiction,
- Provisional order confirmed by the court in the respondent's jurisdiction.

## **New process**

- New process similar to the provincial inter-jurisdictional support process:
  - Section 18: Definitions
  - Section 18.1: Domestic cases
  - Section 19: International cases
  - Section 19.1: Recognition of decisions of designated jurisdiction.